BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the Cable Television Consumer Protection Act of 1992	)	MM Docket No. 93-8
	)	
	)	
Home Shopping Station Issues	)	

To: The Commission

REPLY COMMENTS OF MULTICULTURAL TELEVISION BROADCASTING, LLC

Multicultural Television Broadcasting, LLC ("MTBL"), by its attorneys, hereby replies to certain comments filed in response to the Public Notice[1] issued by the Federal Communications Commission ("Commission") in the above-captioned proceeding. As explained in its initial Comments,[2] MTBL fully supports the Commission's earlier determination that home shopping stations serve the public interest and therefore qualify as local commercial television stations for the purpose of mandatory cable carriage. MTBL is filing these Reply Comments in order to make clear that denying mandatory carriage rights on the basis of a station's programming format would constitute a content-based regulation of speech and would severely undermine the constitutionality of the must-carry rules. In addition, and contrary to the suggestions by some commenters, commercial speech is protected by the First Amendment.

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[1] *Commission Seeks to Update the Record for a Petition for Reconsideration Regarding Home Shopping Stations*, Public Notice, MM Docket No. 93-8 (rel. May 4, 2007).

[2] Comments of Multicultural Television Broadcasting, LLC, MM Docket No. 93-8, filed July 18, 2007.

I. DENYING MANDATORY CARRIAGE ON THE BASIS OF A STATION'S PROGRAMMING FORMAT WOULD CONSTITUTE CONTENT-BASED REGULATION OF SPEECH

Cablevision and NCTA, both cable companies, argue that home shopping stations should not qualify for must-carry status because mandatory carriage of home shopping programming places an unconstitutional burden on the First Amendment rights of cable operators.[3] This argument, which is based on the premise that the Commission's determination of whether a broadcast television station is entitled to mandatory cable carriage should be based on the station's chosen programming format, was implicitly rejected by the Supreme Court when it upheld the must-carry rules precisely because they were content-neutral.[4]

In the *Turner* cases, the Supreme Court applied intermediate scrutiny to the must-carry rules after concluding that they were a "content-neutral regulation designed 'to prevent cable operators from exploiting their economic power to the detriment of broadcasters,' and 'to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming – whatever its content.'"[5] The Supreme Court explained that the must-carry rules survived intermediate scrutiny because they "further important governmental interests" and "do not burden substantially more speech than necessary to further those interests."[6] Denying a station mandatory carriage to which it is otherwise entitled solely on the basis of its program

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[3] *See* Comments of Cablevision Systems Corp. at 11-17, MM Docket No. 93-8, filed July 18, 2007; Comments of National Cable & Telecommunications Association at 3-5, MM Docket No. 93-8, filed July 18, 2007.

[4] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

[5] *Turner II*, 520 U.S. at 186 (quoting *Turner I*, 512 U.S. at 649).

[6] *Id.* at 185.

format would dramatically expand the burden on broadcasters' protected speech and transform the must-carry rules into a content-based regulation of free speech.[7] As the Commission is aware, content-based regulations are subject to strict judicial scrutiny and can only be justified if the Commission can demonstrate that the regulation is essential to achieve a compelling governmental interest.[8] Cablevision and NCTA have failed to identify any compelling government interest that would justify this sweeping change in the must-carry rules, and indeed cannot do so because the current rules accomplish the Commission's stated objectives in a content-neutral, and therefore less intrusive, manner.

In 1997, the Supreme Court held that the extensive factual record developed for *Turner II* supported Congress' judgment that the must-carry rules advance important governmental interests,[9] specifically "'(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.'"[10] It is noteworthy that these important governmental objectives relate to the television broadcast industry generally, and are themselves content-neutral. Indeed, as the Supreme Court itself declared, "[t]he design and operation of the challenged provisions confirm that the purposes

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[7] *See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 93-8, Report and Order, 8 FCC Rcd 5321 at 5329 (1993) ("Report and Order") ("[W]e agree... that the failure to qualify certain licensed stations based upon their programming decisions would place the content-neutrality of the must-carry rules into serious doubt, thereby jeopardizing their constitutionality").

[8] *See Turner I*, 512 U.S. at 641-42 (citing *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *id.* at 125-26 (Kennedy, J., concurring in judgment)).

[9] *See Turner II*, 520 U.S. at 185.

[10] *Id.* at 189 (citing *Turner I*, 512 U.S. at 662).

underlying the enactment of the must-carry scheme are unrelated to the content of speech. The rules... confer must-carry rights on all full power broadcasters, irrespective of the content of their programming."[11] Neither Cablevision nor NCTA have demonstrated persuasively why a station's format, whether home shopping or any other type of programming, is relevant to the must-carry analysis, or why home shopping programming specifically should be the treated differently. Given the absence of any factual record to the contrary, and the potentially devastating economic impact that denial of cable carriage would have on the financial viability of a commercial television station, Cablevision and NCTA's arguments must be rejected.

II. THE FIRST AMENDMENT PROTECTS COMMERCIAL SPEECH AND THE DISTINCTION BETWEEN COMMERCIAL AND ENTERTAINMENT PROGRAMMING DOES NOT PASS CONSTITUIONAL MUSTER.

Commercial speech is protected by the First Amendment.[12] The Supreme Court addressed the issue in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*: "Our question is whether speech which does 'no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection. Our answer is that it is not."[13] The Supreme Court concluded that "even an individual advertisement, though entirely 'commercial,' may be of general public interest."[14] The Supreme Court went on to suggest that commercial speech might contribute to

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[11] *See Turner I*, 512 U.S. at 647-48.

[12] See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-64 (1976).

[13] *Id.* at 762.

[14] *Id.* at 764.

consumers making more informed decisions, and "[t]o this end, the free flow of commercial information is indispensable."[15] Thus, regulation that discriminates against broadcasters upon the basis of "commercial" content undermines protected speech under the First Amendment.

Furthermore, the sweeping classification of home shopping programming as purely commercial speech is simplistic and misleading. In the highly competitive programming market, home shopping programming must be both informative and entertaining to be successful. MTBL also agrees with the comments submitted by HSN that it is not possible "to draw a line between 'commercial' and 'entertainment' programming that passes constitutional muster" and that "such line drawing would be virtually impossible to accomplish even as an academic exercise, as product placements and tie-in promotions can render even the most seemingly pure 'entertainment' programming 'commercial' in nature."[16] Moreover, categorizing programming as either "entertainment" or "commercial" for the purpose of establishing whether mandatory carriage rights attach would be entirely subjective and for that reason alone constitutionally suspect.[17]

III. HOME SHOPPING STATIONS CONTINUE TO SERVE THE PUBLIC INTEREST.

The Commission concluded in 1993 that home shopping stations serve the public interest, and as the majority of commenters in this proceeding concluded, nothing has changed in the past 14 years to alter that conclusion. For example, Shop NBC noted the steady increase in its customer base since 1993 despite increased competition from the Internet as evidence of the

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[15] *Id.* at 765.

[16] Comments of Home Shopping Network, Inc. at 12, MM Docket No. 93-8, filed July 18, 2007.

[17] *See id.*

value that viewers place on its programming.[18] Similarly, WQED Multimedia submitted testimonials from a large number of viewers who rely on home shopping programming for a variety of important reasons.[19] Finally, as the Supreme Court itself has explained, "even an individual advertisement, though entirely 'commercial,' may be of general public interest."[20]

IV. CONCLUSION.

For the reasons set forth herein and in its initial Comments, MTBL respectfully requests that the Petition be dismissed and that the Commission affirm its conclusions in the Report and Order.

Respectfully submitted,

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[18] Comments of Shop NBC at 17, MM Docket No. 93-8, filed July 18, 2007.

[19] *See* Comments of WQED Multimedia at Exhibit A, MM Docket No. 93-8, filed July 18, 2007.

[20] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 764.